COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6273

WILLIAM WARE,

Petitioner,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Chicago, Illinois 60606,
Attorneys for Chicago and North Western Railway Company.

Date: April 28, 1975.

Gunthorp-Warren Printing Company, Chicago • 346-1717

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OPINIONS BELOW.

Both opinions below, that of the United States District Court for the Northern District of Illinois, Eastern Division, and that of the Court of Appeals for the Seventh Circuit are unreported. Appended as Exhibit "A" hereto is the unpublished order of the Court of Appeals; appended as Exhibit "B" is the District Court's Memorandum of Decision.

JURISDICTION.

Respondent, North Western, does not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED.

Mr. Ware's statement of the case and argument indicate that the questions are as follows: (1) Whether an oral settlement, undertaken by parties in open court and appearing of record therein, may be enforced as binding; and (2) Whether a movant under Federal Rules of Procedure, Section 60(b)(3), enjoys an absolute right to an evidentiary hearing regarding issues of fact raised by his motion to vacate, which must be recognized by a trial court, sua sponte, in the absence of an appropriate motion.

North Western would cite an additional question which is raised by the petition, that is, whether a party to a settlement is precluded from challenging its validity if he accepts its benefits with knowledge of the alleged facts invalidating it.

STATUTES AND REGULATIONS INVOLVED.

No statutes or regulations are involved in the questions presented.

STATEMENT.

Prior to entry of the judgment at issue, Mr. Ware had begun the following suits against the North Western in the United States District Court for the Northern District of Illinois: Nos. 71 C 178, 72 C 1131, 73 C 548, 73 C 1136 and 73 C 1940. Each of these suits had been initiated pro se; but intermittently during their progress, various attorneys were employed and later discharged from Mr. Ware's service.

Likewise, the Honorable William J. Lynch, who entered the judgment from which this petition is taken, was not originally designated to hear any of Mr. Ware's cases. Instead, he was the fifth judge in the district to become associated with the cases when they were consolidated before him. Two of the previous

judges having recused themselves pursuant to Mr. Ware's pro se motions.

On March 27, 1974, counsel for North Western and Mr. Ware (then appearing pro se) entered into an oral settlement of the five lawsuits. This agreement was spread of record in open court as demonstrated by citations to the record found in Judge Lynch's Memorandum of Decision, appended hereto as Exhibit "B". The agreement provided that Mr. Ware would accept and receive $14,500 in full settlement of all of his claims.

On April 2, 1974, a Mr. William Cousins, Jr. entered his appearance on behalf of Mr. Ware and later announced on April 10, 1974, before Judge Lynch that he could not recommend the settlement to his client and that he had advised his client not to sign the release which had been drafted by North Western counsel.

At this time Judge Lynch, quoting sections of the transcript of the March 27th proceedings, advised Mr. Cousins that he considered the matter finally settled. He further stated that:

> "The only possible ground in which it could be set aside would be fraud, and the court was an observant to these proceedings. The settlement will be enforced and judgment is rendered in the amount of $14,500 against the defendant, and you will comply and see that it is satisfied. That's the order."

Following, on April 16, 1974, Mr. Ware personally served notice that he would appear pro se on April 17 to present motions to vacate the order of April 10 and to request Judge Lynch to recuse himself from further participation in the case. Specifically, Mr. Ware's motion alleged that the judgment should be vacated because the open court settlement had been procured by fraud and duress. By affidavit in support of his motion, Mr. Ware personally alleged that on March 27, 1974, counsel for defendant had threatened to use political influence to have Judge Lynch dismiss the case if Mr. Ware would not accept $14,500 as full settlement of his claims. Mr. Ware further

alleged that it was a fear of this threat which prompted him to accede to the open court settlement.

Pursuant to Mr. Ware's notice, counsel for North Western appeared before Judge Lynch on April 17, 1974, to be heard on Mr. Ware's motion. Neither Mr. Ware nor counsel appeared in behalf of the motion and it was stricken following this colloquy between the Court and Mr. Daley, counsel for the North Western:

> THE COURT: The plaintiff has not come in—and so the question of how you satisfy your judgment—
>
> MR. DALEY: Well your honor we have a voucher in the sum of $14,500 here. Mr. Ware did stop by the office and present the motion that we had handed to the clerk here along with an affidavit, which I wish to be on record as denying—each and every allegation.
>
> THE COURT: This is for William Ware. He doesn't appear by his counsel, Cousins.
>
> MR. DALEY: Not in this one.
>
> THE COURT: Of course this is after judgment and it is denied. Who presents it? How does it come here?
>
> MR. DALEY: He handed it to us in our office and said, "See you in Judge Lynch's court Wednesday". He has done this—
>
> THE COURT: Denied. He has done that so many times. Denied for want of prosecution.
>
> MR. DALEY: He has done it before.
>
> THE COURT: And I would suggest you retain your voucher. I am concerned about full satisfaction because the company entered into settlement in good faith.
>
> The Court feels that he entered into it in good faith, and now, lately, wants to withdraw from the settlement that was made voluntarily in open court.
>
> . . .

Mr. Ware's pro se motion to vacate the order of April 10 and for Judge Lynch to recuse himself was renewed and again denied on April 18, May 3, May 9 and May 10, 1974.

At no time during these proceedings did Mr. Ware or counsel request an evidentiary hearing regarding the allegations contained in his motion to vacate.

On May 3, 1974, North Western filed its satisfaction of Judgment with the Court, a copy of which is appended hereto as Exhibit "C". Correspondingly, North Western delivered its check to the Clerk of the Court payable to Mr. Ware in the amount of $14,500. Mr. Ware, again acting pro se, then appealed his case to the Seventh Circuit Court of Appeals which adopted the district court's memorandum of decision in denying Mr. Ware's appeal on December 30, 1974.

As shown by Exhibit "D" appended hereto, on or about January 13, 1975, Mr. Ware acquired North Western's check from the clerk and cashed it, thereby receiving and accepting the $14,500.

ARGUMENT.

The issues in this case are uniquely narrow and the mere allegation of judicial abuse cannot serve to convert it into a case warranting review by this Court on certiorari. The facts here presented do not illustrate that this case is one of general interest or significance. No assertion has been made, or indeed could be made, that the effect of the lower courts' decisions could be likely to have consequences for other litigants. Likewise, there is no asserted conflict of decisions. Manifestly, this case contains no important question of federal law or judicial behavior which requires the attention of this Court.

Addressing the merits of Mr. Ware's claims, it is North Western's position that the settlement agreement is valid and binding and that the trial court correctly denied Mr. Ware's motion to vacate for the reason that his allegations of fraud and duress failed for want of proof. North Western further contends that, standing alone, Mr. Ware's affidavit did not entitle him, as a matter of right, to an evidentiary hearing on his

motion to vacate. And, finally, it is the North Western's contention that Mr. Ware's acceptance of the $14,500 settlement fund, with knowledge of the allegations which purportedly invalidated the settlement, precludes Mr. Ware from further contesting the settlement's validity.

I.

The Parties' Statements Made In Open Court Constitute a Binding and Enforceable Settlement Agreement.

The statements made by the parties before Judge Lynch contain all of the elements of an agreement. Both parties agreed to an amount, $14,500; that the payment was in satisfaction of all outstanding claims; and that Mr. Ware was forfeiting any rights of reinstatement.

Federal courts have held under a wide variety of circumstances that a settlement agreement voluntarily enterd into by parties litigant in a pending case cannot be repudiated by either party. *Kelly* v. *Greer*, 365 F. 2d 669, 671 (3rd Cir. 1966), *cert. denied*, 385 U. S. 1035 (1967); *Main Line Theatres, Inc.* v. *Paramount Film Distributing Corp.*, 298 F. 2d 801 (3rd Cir. 1962), *cert. denied*, 370 U. S. 939 (1962); *Strange* v. *Gulf & South American Steamship Company, Inc.*, 495 F. 2d 1235, 1236 (6th Cir. 1974). The inherent power of a trial court to enter a judgment summarily enforcing a pretrial settlement is founded on the policy favoring amicable settlements of disputes and the avoidance of costly and time-consuming litigation and is uniformly recognized. *D. H. Overmyer Co.* v. *Loflin*, 440 F. 2d 1213, 1215 (5th Cir. 1971), *cert. denied*, 404 U. S. 851 (1971); *Clarion Corporation* v. *American Home Products Corporation, et. al.*, 494 F. 2d 860, 863 (7th Cir. 1974), *cert. denied*, 419 U. S. 870 (1974).

Therefore, the court below was correct in entering judgment on the parties' settlement agreement.

II.

The Trial Court Correctly Denied Mr. Ware's Motion to Vacate.

Although not specifically alleged, Mr. Ware's motion to vacate was apparently founded on Federal Rules of Civil Procedure, Rule 60(b) which provides in part:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment. . . ."

It is established that a motion under Rule 60(b) is addressed to the sound discretion of the trial court and that it will not be disturbed on appeal absent an abuse of such discretion. *Wilkin* v. *Sunbeam Corp.*, 466 F. 2d 714 (10th Cir. 1972), *cert. denied*, 409 U. S. 1126 (1973); *Martella* v. *Marine Cooks and Stewards Union, et al.*, 448 F. 2d 729 (9th Cir. 1971), *cert. denied*, 405 U. S. 974 (1972).

It is equally well established that fraud or duress will not be presumed and that a movant under Rule 60(b)(3) must establish fraud by clear and convincing evidence. *Clarion Corp.* v. *American Home Products Corp., et al.*, 494 F. 2d 860 (7th Cir. 1974), *cert. denied*, 419 U. S. 870 (1974); *Wilkin* v. *Sunbeam*

Corp., 466 F. 2d 714 (10th Cir. 1972), *cert. denied*, 409 U. S. 1126 (1973).

The only evidence of fraud or overreaching presented to Judge Lynch was through the bare allegations of Mr. Ware, himself, as found in the affidavit attached to his motion to vacate. Mr. Ware never offered or attempted to repeat those allegations in open court, nor did he at any time request an evidentiary hearing on said allegations.

The allegations contained in Mr. Ware's affidavit, at best, strain credulity. First, they required the court to believe that a personal threat was made by an experienced attorney and officer of the court with intent to influence the outcome of federal litigation. Secondly, that the threat was made in a case which was of no particular moment or concern either to the attorney, himself, or to his corporate client. And, finally, that such a threat was made with an intent to deter Mr. Ware, who, if he had evidenced nothing else in the course of managing his lawsuits, had evidenced that he was a litigious individual, not remotely intimidated by the circumstance of suing his former corporate employer, the North Western, nor by the prestige of the federal forum he had selected.

Plaintiff had acted pro se at various times since his first suit was filed. He had dealt in numerous attorneys since commencing suit. Acting pro se he had, on earlier occasions, been successful in forcing federal trial judges to recuse themselves. He was in the habit of personally delivering notices of motions to the North Western's law department at corporate headquarters. It was, therefore, inconceivable that such threats would have been made to Mr. Ware; that, if made, they would have cowed him; and that, if made, he would have waited several days, while hiring and dismissing an additional counsel, before reporting the threats to the trial court's attention.

Additionally, Mr. Ware was present at the hearing of April 10, 1974, when his counsel of the moment, Mr. Cousins,

unsuccessfully attempted to have the March 27th settlement set aside. He heard Judge Lynch rule that, "The only possible ground on which it could be set aside would be fraud . . ." The record before Judge Lynch clearly demonstrated that Mr. Ware was not a stranger to the use of scurrilous accusations when the occasion appeared to require them. Previously, two federal judges and court appointed counsel had been subjected to accusations of prejudice and racial bias when it suited Mr. Ware's purpose.

Apart from the incredible and self-serving character of Mr. Ware's allegations, Judge Lynch no doubt also considered the following in dismissing Mr. Ware's motion to vacate: (1) Judge Lynch had personally observed the demeanor of both Mr. Ware and counsel for the North Western during the open court settlement proceedings of March 27; and (2) Counsel for the North Western had vehemently denied each and every allegation of the affidavit in open court on April 17, 1974.

Therefore, in determining that Mr. Ware's affidavit did not satisfy the heavy burden of a movant under Section 60(b)(3) and that his motion should be stricken, it is clear that the trial court did not abuse its discretion.

III.

Mr. Ware Is Precluded from Challenging the Validity of the Settlement Agreement Since He Accepted Its Benefits With Knowledge of the Alleged Facts Which Invalidate It.

Exhibit "D" appended hereto consists of a copy of the North Western's cancelled check, made out to and endorsed by Mr. Ware. It evidences the fact that Mr. Ware accepted the $14,500 settlement fund on or about January 13, 1975. At such time, Mr. Ware was undeniably aware of the alleged acts of fraud and coercion which, if proven, would have served to invalidate the agreement.

On the theories of ratification, waiver and estoppel, a party to an agreement of compromise and settlement is precluded from avoiding it if he accepts the benefits of the agreement with knowledge of the alleged facts invalidating it. *L. L. Brown Paper Co.* v. *Hydroiloid, Inc., et al.*, 118 F. 2d 674, 676 (2nd Cir. 1941), *cert. denied*, 314 U. S. 653 (1941); *Eberhart Steel Products Co., Inc.* v. *United States*, 60 Ct. Cl. 912, 917-18 (1925), *cert. denied*, 269 U. S. 571-572 (1925).

Therefore, standing alone, Mr. Ware's acceptance of the North Western's check sufficiently demonstrates that his petition is without merit.

CONCLUSION.

For the foregoing reasons it is submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES P. DALEY,
THOMAS E. GREENLAND,
GEORGE H. BRANT,
400 West Madison Street,
Chicago, Illinois 60606,
Attorneys for Chicago and North Western Railway Company.

Date: April 28, 1975.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Submitted December ___, 1974)
December 30, 1974

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN P. STEVENS, *Circuit Judge*

WILLIAM WARE,
Plaintiff-Appellant,

No. 74-1416 *vs.*

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
71 C 178
William J. Lynch, *Judge.*

ORDER

Plaintiff, William Ware, appeals *pro se*, from a favorable judgment entered on the basis of his pre-trial settlement with the defendant, Chicago and North Western Railway Co. Upon consideration of the record and the briefs, we affirm and adopt the district court's memorandum of decision. Rule 2 Fed. R. App. P.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM WARE, *Plaintiff,*	No. 71 C 178
vs.	No. 72 C 1131
	No. 73 C 548
CHICAGO & NORTH WESTERN RAILWAY, *Defendant.*	No. 73 C 1756
	No. 73 C 1940

MEMORANDUM OF DECISION

This cause has come before this Court for enforcement of a settlement agreement which was entered into on March 27, 1974. For the reasons discussed below that settlement agreement will be enforced.

I.

Mr. William Ware has filed five lawsuits against the Chicago and Northwestern Railway Company. Consolidated Docket Nos. 71 C 178, 73 C 548 and 73 C 1756 are Civil Rights actions alleging discriminatory discharge and refusal to re-employ plaintiff by defendant. No. 72 C 1131 is a F. E. L. A. action involving injuries suffered by plaintiff while an employee of the defendant. Docket No. 73 C 1940 is an offshoot of the Civil Rights action.

II.

This Court is the fifth in this district to spend time attempting to help the plaintiff. The initial case was assigned to Judge Parsons. The second cause, Docket No. 72 C 1131, was assigned to Judge Marovitz who recused himself, saying in his Order of September 15, 1972 "It is apparent that plaintiff read plaintiff's petition in the Shakman case and copies the language of it, and while there is no basis for granting the motion, the Court feels life is too short and transfers the cause to the Executive Committee for reassignment according to the Rules." The cause was then re-assigned to Judge Parsons.

Later both cases were transferred by Judge Parsons to Judge Marshall. Judge McGarr also transferred cases to Judge Marshall, as Judge Marshall had the lowered numbered cases.

Subsequently, Judge Marshall recused himself, stating in his Order of December 17, 1973 "While first welcoming my assistance, Mr. Ware has come to resent my involvement, asserts that I have discriminated against him because he is not represented; has charged an attorney that I appointed with racial bias; has requested that I recuse myself; and has petitioned the Court of Appeals for a Writ of Mandamus to compel me to recuse myself. (On December 12, 1973, the Court of Appeals denied the petition.)" The causes were re-assigned to this Court.

On March 27, 1974, Mr. Ware and Mr. James P. Daley appeared before this Court for a status report at 10:20 A. M. The Court suggested that both men get together and attempt to resolve their differences and report back on April 3, 1974. At 10:30 A. M. on March 27, 1974, Mr. Ware came back and interrupted the Court proceedings and requested that his cases be recalled, which was done. The following conversation transpired.

"Mr. Ware: Your Honor, we've just talked it over and we came to a settlement agreement, and I think we can get it settled over with today.

"The Court: All right.

"Mr. Daley: Judge, I don't know that we can get it settled today because there will be certain documents that have to be drafted, but counsel—excuse me, not counsel, but Mr. Ware—

"The Court: I will hold it on my court call, and you work on getting the documents, and when you have them and they are all signed, bring them in.

"Mr. Daley: Mr. Ware did want to come back here and state on the record before your Honor that he would accept $14,500 as settlement of all matters he presently has against the Chicago & North Western Transportation Company, and also waives any rights to reinstatement as an employee of the company, and this would also include his F. E. L. A.—

"The Court: Why don't you go to your office today, if I may suggest so, Mr. Daley, if you have time, and get it resolved as quickly as you can. He will be happy and so will you, and the court will be even more than pleased, but I will just hold it here. It will not be called until you both come in and tell me that you have taken care of all the details.

"Is that agreeable, or do you want it put over?

"Mr. Daley: I would rather put it over Judge, until say—

"The Court: A week? A week should be able to take care of it.

"Mr. Daley: Well, possibly—

"The Court: Two days?

"Mr. Daley: Monday or so.

"The Court: Monday?

"Mr. Daley: Can you make it Monday?

"The Court: Monday, all right, certainly, I will accomodate you.

"Mr. Daley: Do you care to make any statement on the record to the effect—

"Mr. Ware: Well, your Honor, that's the figure—I agree to accept $14,500 to dispose of any and all claims against the defendant.

"The Court: Very good.

"Mr. Daley: Including all rights of reinstatement?

"Mr. Ware: Including all rights to reinstatement and to any other right I may have growing out of my association with the defendant.

"Mr. Daley: And, your Honor, I assume that if there are any matters pending, such as suits by other attorneys for legal fees, that they will be his obligation to satisfy those?

"Mr. Ware: All right.

"The Court: Yes, sir.

"Mr. Ware: That is understood.

"The Court: All right, put it on Tuesday."

(Transcript pp. 5-7)

On April 10, 1974, Mr. William Cousins, filed his appearance for Mr. Ware and informed the Court that he thought the settlement was against the best interests of his client. Mr. Daley explained the real problem was that Mr. Cousins now wanted $27,000. At this time the Court declared that it would enforce the settlement as agreed to in open court on March 27, 1974, citing *Cummins Diesel Michigan, Inc.* v. *The Falcon*, 305 F. 2d 721, 723 (7th Cir. 1972):

> Federal and State Courts have held under a great variety of circumstances that a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the Court.

In *Clarion Corporation* v. *American Home Products Corporation and Lehman Brothers*, ____ F. 2d ____ Docket Nos. 73-1418, 73-1419, decided April 2, 1974, this Circuit again mandated that the only ground on which a party should be permitted to upset a voluntary settlement would be that it was procured through fraud. The Court has observed the proceed-

ings and could not help but notice how eagerly Mr. Ware requested that the terms of the settlement be spread of record. It feels certain that no fraud had been perpetrated and that the parties intended that the terms of the settlement be binding on each party.

Subsequent to this, on April 18, 1974, defendant filed with this Court an offer of satisfaction of judgment. It is hereby ordered that the settlement agreement be enforced. Judgment is rendered in the amount of $14,500.00 against the defendant.

III.

Plaintiff, once again, wishes to proceed *pro se*, having employed and discharged four different lawyers and rejected a fifth attorney appointed by the Court in 72 C 1131 (the F. E. L. A. action) and employed and discharged three lawyers in the consolidated Civil Rights action.

Mr. William Cousins, Jr., on April 2, 1974 was granted leave to file his appearance for plaintiff. Mr. Ware represented to the Court on April 23, 1974, that he had discharged Mr. Cousins. Since Mr. Cousins has not petitioned the Court for leave to withdraw as counsel, Mr. Ware will not be permitted to appear *pro se*. Plaintiff's motion to proceed *pro se* is hereby denied.

IV.

Plaintiff has filed motions seeking to have this Court vacate its order of April 10, 1974, and requesting this Court to recuse itself. Since this Court will not allow plaintiff to proceed *pro se*, as Mr. Cousins is still the attorney of record, those motions are hereby stricken.

/s/ WILLIAM H. LYNCH,
Judge, United States District Court

Dated: April 26, 1974.

APPENDIX C.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

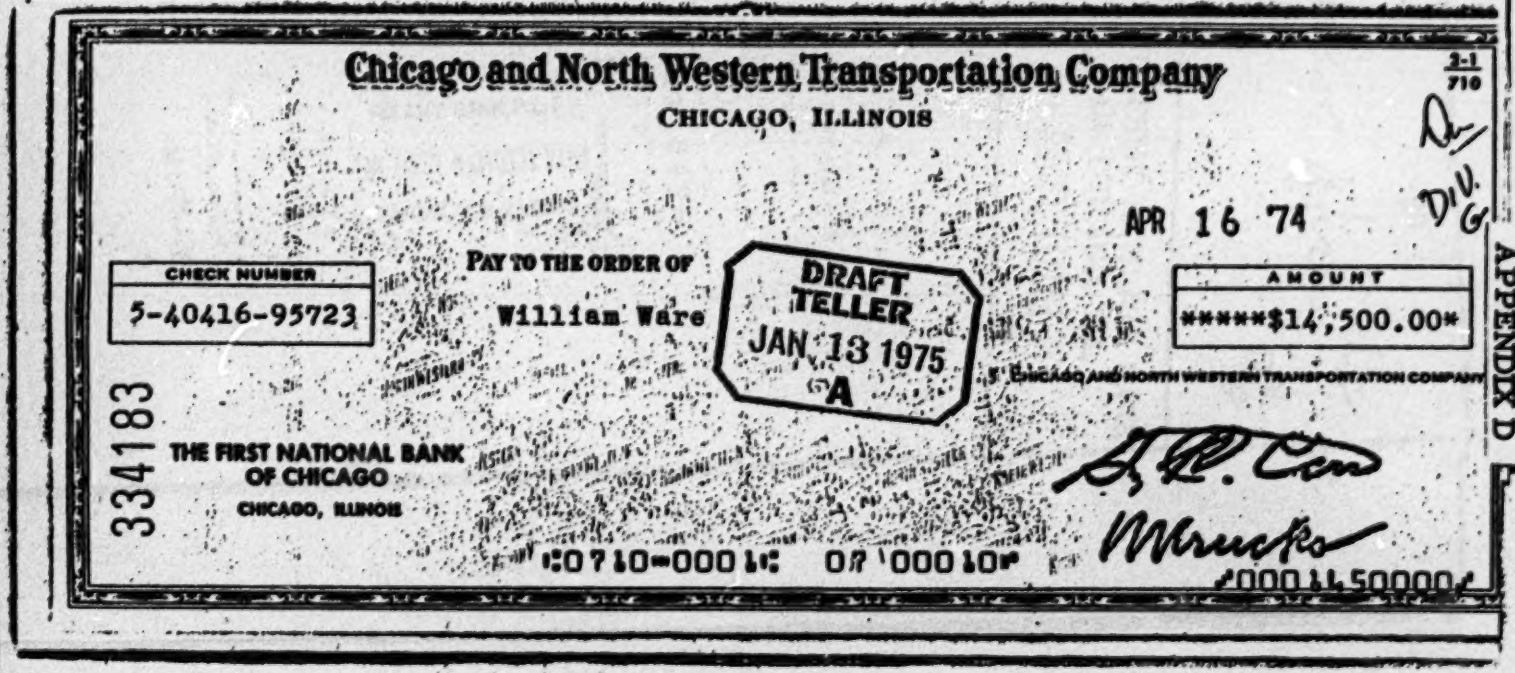
WILLIAM WARE, *Plaintiff,*	No. 71 C 178
vs.	No. 72 C 1131
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Defendant.*	No. 73 C 1756 No. 73 C 548 No. 73 C 1940

SATISFACTION OF JUDGMENT

Now comes the defendant, Chicago and North Western Transportation Company, successor in interest to the Chicago and North Western Railway Company, by its attorneys, James P. Daley and Robert Schmiege, and in satisfaction of the judgment entered herein on April 10, 1974, hereby delivers to the Clerk of the Court Check No. 5-40416-95223 issued on The First National Bank of Chicago on April 16, 1974, to the order of William Ware in the amount of $14,500.00 in payment of said judgment.

/s/ JAMES P. DALEY,
/s/ ROBERT SCHMIEGE,
Attorneys for Defendant

JAMES P. DALEY,
ROBERT SCHMIEGE,
400 West Madison Street,
Chicago, Illinois 60606,
332-2121.



Chicago and North Western Transportation Company

CHICAGO, ILLINOIS

2-1
710

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DIV. G

CHECK NUMBER
5-40416-95723

PAY TO THE ORDER OF
William Ware

DRAFT
TELLER
JAN 13 1975
A

AMOUNT
******$14,500.00*

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

334183

THE FIRST NATIONAL BANK
OF CHICAGO
CHICAGO, ILLINOIS

:0710-0001: OR '000 10"

"000 14 50000"

APPENDIX D

19

20

William Ware Dr

D.V.G

IE FIRST NATIONAL BANK
OF CHICAGO, ILL.
DRAFT TELLER

34 8426

2:1 PAY ANY BANK, P.E.O. 2:1

THE FIRST NATIONAL BANK OF CHICAGO, ILLINOIS 2:1

JAN 1973